

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ERIC SHEVA MANTEL BRANCH, and
MICHAEL D. WILLIAMS,

Defendants.

2:12-cr-00274-JCM-GWF

ORDER

Sealed Motion to Sever (#26)

This matter is before the Court on Defendant Eric Sheva Mantel Branch's Sealed Motion to Sever (#26), filed on February 11, 2013; the Government's Response to Defendant's Motion to Sever (#30), filed on March 11, 2013; and Defendant's Sealed Reply to the Government's Response (#32), filed on March 25, 2013. The Court conducted a hearing in this matter on April 1, 2013.

BACKGROUND

The indictment in this case charges Defendants Eric Sheva Mantel Branch and Michael D. Williams with having conspired to create a fraudulent individual or identity, "William Reed," to purchase a condominium unit. Defendant Branch allegedly acted as the real estate agent for Reed and negotiated the terms of the purchase, which included an illegal kick-back payment to Defendant Williams. *Indictment (#1), Count One*, ¶ 2. The indictment further alleges that Defendants Branch and Williams, and their co-conspirators, created loan applications and supporting documents that contained false information about William Reed's identity, income, intent to occupy the property, and assets. ¶ 4. The indictment further alleges that the sellers wired approximately \$104,000 to the bank account of Defendant Williams' company, KMKM Financial,

1 which Williams then laundered through other accounts set up in the names of “Terry Jones” and
2 “William Reed.” ¶¶ 8-12. Count One of the indictment charges Branch and Williams with
3 conspiracy to commit bank, mail and wire fraud in violation of 18 U.S.C. §1349. Count Two
4 charges them with bank fraud in violation of 18 U.S.C. §1344. Defendant Williams is charged in
5 Counts Three, Four and Five with money laundering in violation of 18 U.S.C. §§1956(a)(1)(B)(i)
6 and 2.

7 The Government summarizes its case against the Defendants as follows: Branch and
8 Williams had worked together previously on other real estate transactions. Branch was an
9 experienced real estate agent and Williams recruited investors to purchase real estate in Las Vegas.
10 In the charged transaction, Williams, working with others, created the false identity of William
11 Reed. Branch then negotiated the purchase of the condominium on behalf of Reed, including a
12 kick-back from the sellers. Branch and an unindicted co-conspirator prepared the purchase
13 agreement and the addendum which provided for the kick-back from the sellers. Branch had direct
14 conversations with the sellers and, when the sellers were initially reluctant to agree to the kick-back
15 payment, Branch, Williams and others threatened to physically harm them and their real estate
16 agent. After the purchase agreement and addendum were executed, the sellers’ real estate agent
17 took the documents to an escrow officer who advised the agent that the addendum was not legal.
18 *Government’s Response (#30), pg. 2.* The Government also alleges that Branch deposited \$40,000
19 into an account in the name of Reed to create the appearance that Reed existed and had “seasoned
20 funds.” Branch and Williams submitted false mortgage loan applications to Countrywide Bank
21 which resulted in the loan being funded and closed. Branch and Williams then told the sellers that
22 the kick-back had to be paid outside of escrow. When the sellers failed to pay the full amount
23 promptly, Branch and Williams threatened them with physical harm. The Government states that
24 “Williams then, apparently, stole the kick-back from his co-conspirator Defendant Branch and
25 laundered the funds through several bank accounts.” *Government’s Response (#30), pg. 3.*

26 Defendant Branch moves to sever his trial from that of Co-Defendant Williams on the
27 grounds that a joint trial would result in unfair prejudice to him. Mr. Branch’s motion is based on
28 the statements that Williams allegedly made to investigating FBI agents on April 18, 2011 and May

31, 2011 which are summarized in the FBI “302” reports attached to Defendant Branch’s motion. *Sealed Motion* (#26), *Exhibits “A” and “B.”* Williams allegedly told the agents that he found William Reed through a search on Craigslist and that his only contact with Reed was over the telephone and through email messages. Williams told the agents that he did not know Reed’s identity was fictitious and denied creating any false documents. Williams also allegedly told the agents that Branch informed him that the sellers were willing to make cash back payment to the buyer. Williams stated that this was the first time he had ever heard of a cash back deal and he did not know that it was illegal. Williams denied having any involvement in structuring the cash back deal. Williams stated that Branch arranged for the cash-back funds to be paid to KMKM Financial’s bank account. Branch was supposed to receive back the \$40,000 that he put into Reed’s bank account, plus an additional \$20,000 from Reed. Although Williams was only entitled to take his “bird-dog” fee, he did not pay Branch his share of the cash back proceeds that were deposited into KMKM Financial’s bank account.

DISCUSSION

Rule 8(b) of the Federal Rule of Criminal Procedure permits the joinder of defendants who have allegedly participated in the same act or transaction or the same series of acts or transactions constituting an offense or offenses. Joinder is generally favored because it promotes efficiency. Rule 14 provides that the trials may be severed, however, when it is apparent that a joint trial would cause prejudice. “The Supreme Court has held that ‘when defendants have been properly joined under Rule 8(b), a district court should grant severance under Rule 14 only if there is serious risk that a joint trial would prejudice a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.’” *United States v. Mayfield*, 189 F.3d 895, 899 (9th Cir. 1999), citing *Zafiro v. United States*, 506 U.S. 534, 539, 113 S.Ct. 933 (1993). *See also United States v. Stinson*, 647 F.3d 1196, 1205 (9th Cir. 2011).

I. Severance Based on *Bruton v. United States*.

Defendant Branch argues that pursuant to *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620 (1968), he will be unfairly prejudiced by the introduction of Defendant Williams’ statements to FBI agents during a joint trial before the same jury. Branch argues that there is no way to redact

1 or edit Defendant Williams' statements to eliminate those portions that implicate him in the alleged
2 crimes. *See Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct. 1702 (1987) (defendant was not
3 prejudiced by co-defendant's confession which was redacted to omit all reference to the defendant
4 and all indication that anyone other than the co-defendant and a third person had committed the
5 crime); *compare Gray v. Maryland*, 523 U.S. 185, 118 S.Ct. 1151 (1998) (the redaction of the
6 defendant's name from the co-defendant's confession did not avoid the Sixth Amendment violation
7 because the confession still provided a direct inference that the defendant was the other individual
8 involved in the crime). The Government concedes that Defendant Williams' statements to the FBI
9 agents cannot be redacted or edited to avoid a violation of Defendant Branch's Sixth Amendment
10 rights. The Government argues, however, that instead of complete severance, the Court should
11 impanel separate juries for each defendant in a joint trial.

12 The Government relies on the Ninth Circuit's en banc decision in *Lambert v. Stewart*, 191
13 F.3d 1181 (9th Cir. 1999) which held that the defendant's Sixth Amendment rights were not
14 violated where the trial court impaneled two juries in a murder trial to separately consider evidence
15 against each defendant which could not be introduced during a joint trial before a single jury. The
16 court stated that "dual juries are in wide use and [] they have worked out just fine. In fact, we have
17 accepted the use of dual juries in noncapital cases. (citations omitted)." 191 F.3d at 1185. The
18 court noted that despite the dangers of prejudice, the Supreme Court has lauded the benefits of joint
19 trials which "promote efficiency and serve the interests of justice by avoiding the scandal and
20 inequity of inconsistent verdicts." *Id.* at 1186. The court further stated: "We are satisfied that the
21 use of dual juries can actually palliate, rather than exacerbate, the risks of a joint trial. Particularly
22 in a case like this one, where the main reason for a severance was one specific class of evidence,
23 the use of dual juries can capture both the advantages of a joint trial and the protections of separate
24 trials." *Id.*

25 In *Wilson v. Sirmons*, 536 F.3d 1064, 1099 (10th Cir. 2008), the Tenth Circuit also rejected
26 the defendant's argument that he was unfairly prejudiced by the use of dual juries in his capital
27 murder case. In so holding, the Court stated:

28 . . .

1 The dual jury procedure is not without problems. Dual jury trials
2 require counsel to guard against prejudicial evidence that might be
3 entered against another defendant, drawing the lawyer's attention
4 away from his own client. This increases the already difficult job of
5 the capital defense lawyer. Additionally, constantly removing a jury
6 from the room interrupts the flow of trial and can confuse the jury.
7 Jury management difficulties increase two-fold. *Scarborough v.*
8 *State*, 50 Md.App. 276, 437 A.2d 672, 674–75 (Spec.App. 1981); *see*
9 *also United States v. Rimar*, 558 F.2d 1271, 1273 (6th Cir. 1977);
10 *State v. Corsi*, 86 N.J. 172, 430 A.2d 210, 213 (1981) (“[T]he
11 multiple jury procedure ... can involve substantial risks of prejudice
12 to a defendant's right to a fair trial.”).

13 The court noted, however, that many of the potential harms from a dual jury procedure are
14 also present and possibly magnified in a trial where the defendants are tried jointly. Like the Ninth
15 Circuit in *Lambright*, the court stated that the use of a dual jury system may be “a reasonable
16 response to prejudicial joinder, as it recognizes the court’s interest in efficiency while mitigating
17 the prejudice inherent in joint trials by diminishing the amount of inadmissible evidence a jury
18 hears.” *Id.*

19 The Government states that dual juries were employed successfully in this District in *United*
20 *States v. Reed*, Case No. 2:08-cr-164 KJD-GWF.¹ The Government also states that dual juries were
21 used in a trial before Judge George, but the Government has not yet been able to identify the
22 specific case. The Government estimates that a joint trial in this case will take five to seven days.
23 The Government states that it will present evidence and testimony relating solely to Defendant
24 Williams at the end of its case-in-chief, so that the need to remove Defendant Branch’s jury from
25 the courtroom during the presentation of evidence can be minimized. In opposing the use of dual
26 juries, Defendant cites problems similar to those noted by the Tenth Circuit in *Wilson v. Sirmons*.
27 Defendant also points out that the courtrooms in this courthouse are not designed or equipped to
28 conduct dual jury trials and that the members of one jury will have to sit in the courtroom gallery
where they may overhear improper conversations from observers. *Defendant’s Reply* (#32), pg. 4.

29 ¹ *United States v. Reed* involved four defendants. The court severed the trial as follows:
30 Two defendants, Reed and Jackson, were tried together before separate juries. The other two
31 defendants were tried together before one jury. The dual jury trial involving Reed and Jackson took
32 five days to try. Jackson was convicted. A mistrial was declared as to Reed, who was subsequently
33 convicted following a three day trial.

1 Defendant argues that the problems arising from dual juries outweigh the benefits to be gained by
2 using that procedure. Defendant estimates that separate trials will each take approximately four
3 days.

4 Before determining whether the use of dual juries is an advisable procedure for this case,
5 the Court addresses Defendant's other arguments in support of severance.

6 **II. Defendant's Other Arguments for Severance.**

7 Defendant Branch argues that severance is also required because he and Defendant
8 Williams have mutually exclusive or antagonistic defenses and, in particular, that Defendant
9 Williams will attempt to gain acquittal by placing the blame for the alleged crimes on Branch. He
10 also argues that he will be unfairly prejudiced in a joint trial because Defendant Williams is
11 charged in the additional money laundering counts which increase Defendant Branch's risk of
12 conviction even though he is not charged in those counts.

13 In *Zafiro v. United States*, 506 U.S. 537, 113 S.Ct. 933, 937 (1993), the Supreme Court
14 stated that there is a preference in the federal system for joint trials because they promote efficiency
15 and "serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts."
16 Joint trials are particularly appropriate in conspiracy cases because the evidence regarding the
17 statements or acts of the other conspirators in furtherance of the conspiracy will be admissible
18 against the defendant even if he is tried alone. *United States v. Cruz*, 127 F.3d 791, 799 (9th Cir.
19 1997); *United States v. Freeman*, 6 F.3d 586, 598 (9th Cir. 1993). See also *United States v.*
20 *Sweeney*, 688 F.2d 1131, 1140 (7th Cir. 1981), quoting *United States v. Kahn*, 381 F.2d 824, (7th
21 Cir. 1967) (stating that severance should not be granted in a conspiracy case "except for the most
22 cogent reasons.").

23 In *United States v. Vasquez-Velasco*, 15 F.3d 833, 846 (9th Cir. 1994), the court stated that
24 "[i]n assessing whether joinder was prejudicial, of foremost importance is whether the evidence as
25 it relates to individual defendants is easily compartmentalized." (citation omitted.) "Central to this
26 determination is the trial judge's diligence in instructing the jury on the purpose of the various
27 types of evidence." *United States v. Fernandez*, 388 F.3d 1199, 1241 (9th Cir. 2004) cites four
28 factors that courts should consider in determining the prejudicial effect of a joint trial, the most

1 important of which are whether the jury can be reasonably expected to collate and appraise the
2 individual evidence against each defendant and whether the judge is diligent in instructing the jury
3 on the limited purposes for which certain evidence may be used. *Vasquez-Velasco* stated that
4 “[t]he most common reason for severing a trial is where codefendants present mutually exclusive or
5 irreconcilable defenses.” The court cited *United States v. Rucker*, 915 F.2d 1511, 1513 (11th Cir.
6 1990) in which the defendants each claimed ignorance of contraband found in a jointly occupied
7 vehicle, such that the jury would be unable to believe the testimony of either defendant without
8 disbelieving the codefendant’s testimony. *Vasquez-Velasco* also stated that severance has been
9 granted when the charges brought against the defendants or the weight of the evidence supporting
10 each charge is wholly disparate or disproportionate. *Id.*

11 In *United States v. Tootick*, 952 F.2d 1078, 1080 (9th Cir. 1991), the court reversed
12 defendants’ convictions where they accused each other of having stabbed the victim. The court
13 stated a defendant must meet a heavy burden to overturn a conviction based on the denial of a
14 motion to sever. Merely showing that a comparative advantage would result from separate trials
15 does not satisfy this burden. Likewise, mere inconsistency in defense positions is insufficient to
16 find codefendants’ defenses antagonistic. Rather, “[m]utually exclusive defenses are said to exist
17 when acquittal of one codefendant would necessarily call for the conviction of the other.” *Id.* at
18 1081. “The prototypical example is a trial in which each of two defendants claims innocence,
19 seeking to prove instead that the other committed the crime.” *Id.* The defendants in *Tootick* met
20 that burden by showing that their respective defenses were based on attempting to prove that the
21 other defendant committed the crime. The court stated that the defendants’ attorneys acted as
22 “unsanctioned prosecutors” during the trial. *Id.* at 1085. In reversing the convictions, the Ninth
23 Circuit also cited the trial judge’s failure to control the defendant’s counsel’s conduct or instruct the
24 jury at appropriate times during the trial.

25 In *Zafiro v. United States*, 506 U.S. 534, 538-39, 113 S.Ct. 933, 937-38 (1993), the
26 Supreme Court declined to adopt a “bright-line” rule mandating severance whenever codefendants
27 have conflicting defenses. The court stated that mutually exclusive defenses are not prejudicial *per*
28 *se*. The Court affirmed the defendants’ convictions because acquittal of one or more of the

defendants on the drug possession charges did not necessarily require the jury to convict another defendant. In *United States v. Mayfield*, 189 F.3d 9895 (9th Cir. 1999), the Ninth Circuit distinguished *Zafiro* in holding that the defendant was prejudiced by the denial of severance. The two defendants in *Mayfield* were the only occupants of the residence in which narcotics were discovered during the execution of a search warrant. The evidence established that the narcotics belong to either one or both of the defendants. At trial, the co-defendant's counsel attempted to prove that Mayfield was the owner of the narcotics. The prejudice to Mayfield was also exacerbated by the introduction of inadmissible evidence by the co-defendant's counsel and by his repeated reference to that evidence during argument.

In *United States v. Voigt*, 89 F.3d 1050, 1094-95 (7th Cir. 1996), however, the Seventh Circuit stated that while mutually antagonistic defenses have been much discussed in theory, only rarely have courts found that they exist in practice. "Far more frequently, courts have concluded that the asserted defenses, while in conflict with one another, are not so irreconcilable that '[t]he jury could not have been able to assess the guilt or innocence of the defendants on an individual and independent basis.' *Tootick*, 952 F.2d at 1083." *Voigt* also noted that courts have consistently held that finger-pointing and blame-shifting among co-conspirators do not support a finding of mutually exclusive defenses. *Id.* at 1095, citing *United States v. Provenzano*, 688 F.2d 194, 198 (3rd Cir.), *cert. denied*, 459 U.S. 1071, 103 S.Ct. 492 (1982) and *United States v. Smith*, 44 F.3d 1259, 1266-67 (4th Cir. 1995).

The Fourth Circuit, in *United States v. Smith*, stated in this regard:

Because joint participants in a scheme often will point the finger at each other to deflect guilt from themselves or will attempt to lessen the importance of their role, a certain amount of conflict among defendants is inherent in most multi-defendant trials. In order to justify a severance, however, joined defendants must show that the conflict is of such magnitude that "the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty." *United States v. Becker*, 585 F.2d 703, 707 (4th Cir. 1978) (citation omitted), *cert. denied*, 439 U.S. 1080, 99 S.Ct. 862, 59 L.Ed.2d 50 (1979) (quoting *United States v. Ehrlichman*, 546 F.2d 910, 929 (D.C.Cir. 1976), *cert. denied*, 429 U.S. 1120, 97 S.Ct. 1155, 51 L.Ed.2d 570 (1977)).

44 F.3d at 1266-67.

1 In *United States v. Sutherland*, 2011 WL 4007536, *3 (D.Nev. 2011), the district court
2 upheld the magistrate judge's order denying the defendant's motion to sever her trial from the co-
3 defendants in a mortgage fraud scheme in which defendants were charged with conspiracy to
4 commit wire, mail and bank fraud. In so holding the court found that defendant's argument that her
5 claim of innocence would require the jury to convict her co-defendants was not necessarily true and
6 therefore did not require severance. In so holding, the court distinguished *Tootick* and cited the
7 foregoing statements from *Voigt*.

8 Defendant Branch argues that Williams' statements to the FBI agents show that he intends
9 to defend himself by placing the entire onus on Mr. Branch for the transaction. This includes
10 Williams' alleged assertion to the FBI that (1) Branch initiated the plan for Williams to locate a
11 purchaser in exchange for a \$5,000 fee; (2) Branch knew the sellers; (3) Branch brought up the idea
12 for the cash back payment from the buyers; (4) Branch drafted the purchase agreements; (5) Branch
13 told Williams that the cash back payment would be made outside of escrow; (6) Branch advised
14 Williams that the lender needed to see money in William Reed's bank account, which Branch
15 deposited; (7) Branch dictated how to structure the payments after the closing; and (8) Branch
16 threatened Williams because he did not receive his payment back from the deal. *Motion (#26)*, pgs.
17 10-11.

18 Whether Williams will actually testify at trial regarding the foregoing is unknown.
19 According to his alleged statements to the FBI, Williams' principle defenses to Counts One and
20 Two of the indictment are that he believed William Reed actually existed, that he did not create
21 false documents regarding Reed and that he did not know a cash-back payment outside of escrow
22 was illegal. These defenses, if believed, do not necessarily implicate Defendant Branch or result in
23 his conviction. A reasonable doubt as to whether Mr. Reed actually existed could also benefit Mr.
24 Branch's defense. Mr. Williams' alleged lack of knowledge that a cash back transaction was illegal
25 does not establish that Mr. Branch knew it was illegal. The Defendants' defenses are, therefore, not
26 so mutually exclusive or antagonistic as to require severance. Likewise, the money laundering
27 counts against Defendant Williams are sufficiently distinct from the charges against Branch that the
28 jury, with the aid of appropriate instructions, should be able to compartmentalize the evidence

1 relating to those charges and separate them from its consideration of the evidence against
2 Defendant Branch on the conspiracy and bank fraud counts. Severance is therefore not warranted
3 on the basis of these arguments.

4 **CONCLUSION**

5 This brings the Court back to the question of whether separate trials should be granted or a
6 joint trial should be conducted with two juries. A dual jury trial would adequately protect
7 Defendant Branch's Sixth Amendment rights under *Bruton*. Although Defendant Branch's other
8 arguments do not require separate trials, the granting of completely separate trials would also guard
9 against whatever prejudice might result from either defendant's attempt to cast the blame on the
10 other. The District Judge, who must ultimately supervise and manage a dual jury trial, is better able
11 than the undersigned magistrate judge to assess the burdens and efficiencies of conducting a dual
12 jury trial in this case versus ordering separate trials for the Defendants. Accordingly,

13 **IT IS HEREBY ORDERED** that Defendant Eric Sheva Mantel Branch's Sealed Motion to
14 Sever (#26) is **granted** as follows:

15 In order to protect Defendant Branch's Sixth Amendment rights pursuant to *Bruton v.*
16 *United States*, the Court should impanel two juries, one for each Defendant, so that evidence
17 admissible only as to one Defendant is not presented to the jury assigned to the other Defendant.
18 Alternatively, the Court should grant separate trials to the Defendants if the District Judge
19 determines that the logistical problems and burdens of conducting and supervising a dual jury trial
20 outweigh the benefits of that procedure over separate trials for the Defendants.

21 DATED this 4th day of April, 2013.

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23 
24 GEORGE FOLEY, JR.
25 United States Magistrate Judge
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